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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. 303

GASTON TURNER,
Petitioner,

vs.

THE STATE OF MISSISSIPPI.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Gaston Turner, the petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi.

OPINIONS BELOW

The Trial Court rendered no written opinion. The Supreme Court of Mississippi affirmed in an opinion found in Miss. 220 So. 2d 295.

Petition for rehearing was filed seasonably and rehearing was denied without written opinion on March 31, 1969.

The motion for a mistrial was denied by the Trial Court in an unwritten ruling and was not in the record, but may be found in the bill of exceptions.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked on the grounds that the petitioner was denied due process of law in that he was denied the opportunity to be heard by himself or counsel and in that he was convicted under an instruction to the jury which placed the burden of proof on him as the defendant and which instruction in the application, which it has obtained in the courts of the State of Mississippi, further denied a fair trial and due process to the petitioner by rendering the law vague to the degree that the average man would not comprehend the law to his understanding.

The petitioner was tried for murder and convicted for the crime of manslaughter February the Eighth, Nineteen Hundred and Sixty-Nine. The Supreme Court of the State of Mississippi affirmed the conviction by an order entered March 3, 1963 (opinion appears in Appendix ii). The petition for a rehearing was denied without opinion on the Thirty-First of March, Nineteen Hundred and Sixty-Nine.

The jurisdiction of the Supreme Court of the United States is invoked under Title 28, United States Code, Section 1257, Subparagraph Three.

QUESTIONS PRESENTED

(1) Whether the State of Mississippi may convict a defendant of a crime under a statute which has been so construed by the courts of the State of Mississippi, as to render two interpretations of said statute each markedly

different from the other and whether such a dichotomy of rule on the same statute would operate to so fatally taint the statute with vagueness as would render the statute unconstitutional.

(2) Whether the State of Mississippi may convict a defendant under a law which has been construed in two markedly different lines of decision either of which has been historically allowed as a jury instruction and whether because of the great difference existing between the two lines of decision the statute as applied discriminates between individual defendants denying them due process of law.

(3) Whether the State of Mississippi may convict a defendant in a trial employing jury instructions which are so markedly different on the same point of law as to create an inevitable confusion which probably would operate to the prejudice of the defendant.

(4) Whether the State of Mississippi may employ a jury instruction interpreting a statute in such a manner as to place the burden of proof on the defendant of matters beyond his ability to know within reason.

(5) Whether the State of Mississippi may employ an instruction which defines the law of self defense in a manner entirely foreign to the American system of justice, which manner, in effect, denies the defendant the inalienable right of defense of person.

(6) Whether the State of Mississippi may convict a defendant in a trial where his attorney was denied a reasonable amount of time to argue the evidence to the jury, in that he was limited to ten minutes, thereby depriving the defendant of a dignified and orderly trial.

(7) Whether the State of Mississippi may convict a defendant in a trial where the trial judge so severely lim-

ited the defense attorneys that they were unable to conduct an orderly and dignified defense, in that the court did harass and continually admonish the defense attorneys to an unseemly haste.

(8) Whether the State of Mississippi may convict a defendant in a trial where the trial judge exhibited so harsh and biased an attitude toward the defendant, when he did continually admonish the defense attorneys to "get on" and hurry up, that his conduct may well have fatally infected the defense with the taint of an implied guilt from the bench.

(9) Whether the State of Mississippi may convict a defendant in a trial where the Trial Court heaped abuse and indignities on the Defense Counsel and yelled and shouted to the Defense Counsel in such a manner that it seemed that the Court was of low opinion regarding petitioner's right to a dignified and orderly trial and whether such conduct on the part of the Trial Court operated to the prejudice of petitioner, thereby denying petitioner a fair trial.

(10) Whether this cause involved the determination by a state court of a federal question of substance not heretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(11) Whether this cause was determined in the state courts based on an adequate non-federal ground which might support such judgment.

(12) Whether the state court's judgment could have been reached without deciding the federal question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As set out in Appendix i, the statutory and constitutional provisions are: United States Constitution, Amendment VI and Amendment XIV; the Mississippi State Constitutional provisions are Section 14 and Section 26.

The Statutory provisions involved are the Mississippi Justifiable Homicide Law as set forth in Section 2218 of the Mississippi *Code* of 1942, as amended, subparagraph (f).

STATEMENT OF THE CASE

The Petitioner was tried for the crime of murder in the Circuit Court of Jackson County, Mississippi. He was found guilty of manslaughter and sentenced to a term of ten years in the State Penitentiary.

The trial was held in the course of one day and a large part of one night and was thus completed in one session of the court. The trial began shortly after eleven A.M. and was recessed for the noon hour to reconvene at 1:15 P.M. Proceedings were then held until six P.M., when a thirty minute recess was declared. The trial resumed after the six o'clock recess and proceeded to an end and the case went to the jury at ten minutes before ten P.M.

No objection was made to this method of trial.

The state called seven witnesses and the defense called eleven witnesses. Two of the state's witnesses were called twice. The eighteen witnesses rendered testimony which was conflicting from the standpoint of each respective party to the suit. This conflicting testimony related to the most important aspects of the case.

The conflicting testimony centered around the acts of the Deceased as well as the Petitioner in the time immediately prior to the slaying; and the acts of the Petitioner immediately after the slaying.

The course of the trial was hastened and the atmosphere charged and marred by the Trial Court's insistent urgings for greater speed and haste on the part of the defense (R. pages 113, 158, 199, particularly page 205, page 222, page 235, page 249, page 252 and also particularly page 285, page 96 all of record).

At one point in the proceedings counsel for the defense was asked for a slower presentation by the court reporter, which demonstrates the lengths that the Trial Judge went to hurry the trial (R. page 206).

At another point in the proceedings the associate counsel for the defense was admonished in the presence of the jury that he was going to have to sit down and chief counsel for the defense would be required to take over the examination of the witness (R. page 113). This was pronounced in a loud voice.

The trial lasted from just before noon until slightly before ten P.M.; yet, at the end of the proceedings the defense attorneys were allowed but forty minutes for their final arguments and reading of the instructions; where, the State was allowed some fifty-five or sixty minutes. At the time when the Trial Court stopped the defense counsel from commenting on the case and evidence, he had only been allowed ten minutes to so comment. Timely objection was made and the Trial Court in the presence of the jury shouted at the defense attorneys to "shut up and sit down". An attempt was made to object to this shouting by the judge, but was also shouted down by the judge (R. page 285).

A bill of exceptions was filed from which the times of all but the District Attorney, with regard to final arguments (R. page 334), may be determined exactly. The time of the District Attorney may be approximated by the taking into consideration of several facts which fortunately are of record.

Instruction number two for the State was objected to before the Trial Court (R. page 296) and the issue was raised on appeal to the Supreme Court of Mississippi. Both courts allowed the instruction to stand. The error was assigned in the appeal and a request to charge was advanced to negate this instruction in the Trial Court. The Trial Court's ruling was unwritten. The opinion of the Mississippi Supreme Court (Appendix ii) affirmed.

The objection in both courts was made that this instruction places the burden of proof on the Petitioner in an unfair way. The further contention was made that this instruction provided a confusing standard for the determination of the law by the jury in the case at bar.

The Mississippi Supreme Court affirmed as to the objection and assignment of error regarding the time allowed for final arguments.

A motion, based on time not allowed for final arguments, was disallowed by the Trial Court.

REASONS FOR GRANTING THE WRIT

The Mississippi statute governing the defense of justifiable homicide has been, it seems, the victim of a long string of decisions which leave the law on the subject, unfortunately, clouded and confused. There are two separate and distinct definitions of the right of self defense, which may be seen from a reading of the decisions determinative of correctness of jury instructions.

The two definitions simply stated are: (1) that a man may justifiably take the life of another if he has a reasonable apprehension of present danger of serious bodily injury or death at the hands of the person slain; (2) that a man may take the life of another in self defense impliedly, only if there is a real as well as apparent danger to him from the person slain.

Decisions following the first line of construction are *Cotton* v. *State*, 31 Miss. 504, *Folks* v. *State*, 230 Miss. 217, 92 So. 2d 461 (1957), *Bailey* v. *State*, 174 Miss. 453, 165 So. 122 (1936), *Lee* v. *State*, 232 Miss. 717, 100 So. 2d 358 (1958), *Holmes* v. *State*, 199 Miss. 137, 24 So. 2d 90 (1945), *Jackson* v. *State*, 79 Miss. 42.

In the *Folks* case an instruction was given defining the defense of justifiable homicide in an instruction carrying the same quality of explication of the law as the case at bar. However, the Mississippi Supreme Court reversed and remanded the case for a determination of the issue of self defense on another ground. And, while the reversal was pendant in great part on the issue of the weight of the evidence, the court gave an order that the second trial turn on the issue of "whether the appellant had good cause to believe and did believe that he was in . . . danger . . . real or apparent." This was in effect a denial of the former instruction by the court. This case is important for the reason that it exemplifies in two pages the problem which has historically plagued the construction of subparagraph (f), Section 2218 of the Mississippi *Code*. In this one decision the unhappy and confusing problem of when and at what point the acts upon which a slaying is predicated cease to be murder and become justifiable is seen.

The case of *Holmes* v. *State, supra,* was appealed on an instruction like the one in the case at bar. The issue here was deemed by the court to turn on the fact that the

other instructions cured the defect. The defect was such as is presently assailed in attacking the validity of this statute as applied. The word "apparent" was deleted from the instruction in the *Holmes* case thereby according to the Mississippi Supreme Court "technically" misleading the jury. It is submitted that any misleading of the jury is of necessity more than technical.

The case of *Bailey* v. *State, supra,* recognized that the instruction given in the case at bar was tainted when the Mississippi Supreme Court said that this instruction "standing alone might mislead" but affirmed saying that the other instructions cured the defect. The instruction was criticised in the *Bailey* case for deleting the justification of a homicide, from the next to the last definitive part of the instruction, where the danger is springing from an apprehension of bodily injury. The instruction in the case at bar commits a like sin.

In the case of *Jackson* v. *State, supra;* a similar case where a Negro had killed a white man and upon trial requested and was refused an instruction based on the "cause to believe and did believe" line of decisions, the Mississippi Court reversed saying that such was the law in Mississippi and that it was error not to so charge the jury.

The other line of decisions, which defines the law in much harsher terms and provides the confusion is exemplified by the cases of *Johnson* v. *State,* 46 So. 2d 924 (1950), not reported in State Reports, *Dobbs* v. *State,* 200 Miss. 604 29 So. 2d 84 (Cert. Denied) 331 U.S. 787, 67 S.C. 1318, 91 L.Ed. 1817 (Reh. Denied) 331 U.S. 868, 67 S.C. 1533, 91 L.Ed. 1871, as well as in the case at bar.

The instruction in the *Johnson* case, *supra,* used the terminology: "no immediate danger, real or apparent" without reference to the state of mind of the defendant

with regard to the reasonable fear or apprehension which he might have been entertaining at the time. In this case the court decided that there was no error sufficient to reverse since the defendant had received an instruction which cured the defect. However, the jury could not have been other than abysmally confused by the apparent conflict in the instructions from the State and the instructions which stemmed from the defendant's counsel.

The *Dobbs* case, *supra,* upheld an instruction which gave the jury the basis of "imminent danger of such intention being accomplished" as the degree of proof necessary for the jury to find the homicide justifiable. The Mississippi Court in spite of the "solemn and serious consequences" of the case recognized in the opinion upheld the case.

It is submitted then that the Mississippi *Code* of 1942, Section 2218, subparagraph (f), is so vague as to render it in its application an unconstitutional law with regard to the rights of the defendants tried thereunder.

The following cases lend support to this contention: *United States* v. *Petrillo,* 332 U.S. 388, 79 L.Ed. 1877, 67 S.C. 1538 and *United States* v. *Harriss,* 347 U.S. 612, 98 L.Ed. 989, 74 S.C. 808.

Even if the Mississippi decisions explicating the law of self defense in such a diverse and confusing manner be not sufficient for certiorari, then the divergencies of law bring forth the objection that inasmuch as the Mississippi decisions are not uniform that they operate in a discriminatory manner.

This contention is based on the proposition that, of necessity, in light of the reported decisions cited, and the language contained therein, that in the different trials of the different persons who plead this defense standards are

employed which vary the application of the law to such a degree that an unavoidable lack of equal treatment under the existing law prevails. To correct such an undesirable condition only a standardization of the law with regard to all defendants will suffice.

In support of the contention that such a law is violative of the due process of a defendant in a criminal trial, petitioner cites the cases of *Rogers* v. *Alabama*, 192 U.S. 226, 48 L.Ed. 417, 24 S.C. 257, *Tarrance* v. *Florida*, 188 U.S. 519, 47 L.Ed. 572, 23 S.C. 462, *General Oil Company* v. *Crain*, 209 U.S. 211, 52 L.Ed. 754, 28 S.C. 475 and *Concordia Fire Insurance Company* v. *Illinois*, 292 U.S. 535, 78 L.Ed. 1411, 54 S.C. 830.

In the case at bar there were two different instructions given regarding the definition of the law applicable to justifiable homicide. In light of this it is contended that, the admission of two such different interpretations of the law, as were admitted here, served to only confuse the jury, and inasmuch as there is great concern amounting to hysteria gripping certain parts of our nation and peoples over law and crime, such a confusion might well operate to the prejudice of the defendant. Such a conflict of law must be resolved against the defendant by such a confused jury when the state's instruction is clothed with the mantle of righteous law and order. It is submitted that such would so prejudice the fairness and orderliness of the trial that the defendant would be denied due process of law.

Miller v. *United States*, 120 F. 2d 968, *Mann* v. *United States*, 319 F. 2d 404 (Cert. Denied) 84 S.C. ....., 11 L.Ed. 2d 474, *Finn* v. *United States*, 219 F. 2d 894 (Cert. Denied) 75 S.C. 583, 99 L.Ed. 1242, *Williams* v. *United States*, 179 F. 2d 644, Aff. 71 S.C. 581, 341 U.S. 70, 95 L.Ed. 758.

The manner in which the instruction places the burden of proof upon the petitioner is seen in the wording of the last lines "A party may have an apprehension that his life is in danger, and believe the grounds of his apprehension, just and reasonable, and yet he acts at his peril. He is not the final judge; the jury may determine the reasonableness of his acts."

This instruction operates to place the burden of proving whether or not the defendant was acting in a reasonable manner entirely on the defendant. In this case due to the peculiar fact situation the ability of the defendant to know or even determine these facts was precluded by the situation existing immediately after the shooting.

The petitioner was in a position more than sixty feet distant from the place where the body lay and it was a foggy night. There gathered around the body post-haste a coterie of friends of the deceased as well as curiosity seekers. There was a large number of persons who gathered around the body, in fact an estimated number of around forty persons at various times. There was further a time space of almost a half an hour before any official of the law viewed the scene where the body lay.

The petitioner, then, may be seen to be completely unable to determine the facts surrounding the presence of a gun or other engine of death. That there was conflicting testimony concerning who was first to reach the body is in itself enough to raise a severe doubt that the petitioner should have the burden of proof laid at his feet.

That the petitioner himself was unable to approach the body of the deceased after the shooting seems altogether conclusive of the fact that the petitioner would be unreasonably burdened by the imposition of this burden of proof.

Cases which are cited in support of this contention and which give the rule that such shiftings of the burden of proof must not place an unreasonable burden on the defendant are: *Morrison* v. *The People of the State of California,* 54 S.C. 281, 291 U.S. 82, 78 L.Ed. 664; *Tot* v. *United States,* (N.J.) 63 S.C. 1241, 319 U.S. 463, 87 L.Ed. 1519, and (Companion case to *Tot*) *United States* v. *Delia* (Michigan).

In the *Tot* case at headnote six the opinion of Mr. Justice Roberts states:

> The argument from convenience is admissable only where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with the proof will not subject him to unfairness or hardship (here the Court cites *Morrison* v. *California, supra*).

It can be seen from reading the opinions of the Court in these cases that there was never in the minds of the framers of the Constitution, or in the minds of those who have interpreted it, the intention that the charged party should bear the burden of proving his innocence unless extraordinary circumstances obtain. From the record it will easily be seen that this petitioner was remarkably prejudiced by the imposition of this burden. In fact, it would be hard to imagine how he would have been less able to determine such facts in any other situation where the defense of justifiable homicide could be asserted. The petitioner was thus deprived of his day in court as well as the due process of the laws.

The instruction so complained of in the manner in which it operates to deny the petitioner the right to defend himself in the face of the reasonable assumption that he was about to be murdered, along with those who he was hired to protect, is further worthy of the United

States Supreme Court's consideration in accord with the decision in the case of *Leland* v. *Oregon,* 343 U.S. 790, 96 L.Ed. 1802, 72 S.C. 1002. The Court speaking through the opinion of Mr. Justice Clark in headnote number two said:

> The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental" (citing Snyder v. Massachusets, 291 U.S. 97, 105, 78 L.Ed. 674, 677, 54 S.C. 330, 90 ALR 575 (1934)).

It is undoubtedly one of the cardinal principles of the Anglo-American System of Jurisprudence that one has an inalienable right of self defense in the face of an unlawful aggression. This right has been extended in most of the United States from the old common law rule to give the right to a man, not after he has retreated to the wall or the ditch or in his home, but in any place where he is with a lawful right to so be.

The application of this law as embodied in the instruction complained of is an inevitable denial in fact of the petitioner's right to defend himself. The inevitability is inherent in the instruction's placing the defendant in a position where he must not only prove his innocence but he must also do so in a manner for which he is singularly unsuited.

The petitioner was, in that foggy night, the victim of a set of circumstances which shocks the conscience when the burden in this case is placed on him. He had just fired and seen his target, whom he supposed was armed and dangerous, fall. His knowledge of the condition or

whereabouts of the decedent was totally lacking. He was immediately thereafter made the target of considerable threats and was consequently unable to even concentrate his thoughts on the decedent much less examine the premises to determine the presence of a gun or other lethal instrumentality.

There were more people there than anyone could accurately estimate, surrounding the body, any one of whom could have removed the weapon of which the decedent had bragged. There were several persons there who would have had an interest in moving the gun, close friends of the dead man.

It can be seen then that placing such a harsh burden on the petitioner operated to his prejudicial detriment when he was required to produce evidence which was located in the center of a crowd of angry drinking cohorts of the deceased.

Petitioner complains to this Honorable Court that his right to counsel as guaranteed in the Constitution of the United States of America was denied him, in that the Trial Court acted in such a manner that his counsel were rendered ineffective.

This occurred during the course of the trial when the Trial Court repeatedly urged and hastened the defense counsel in a manner which besides being unseemly was so undignified and brusque that the inference might well, and easily so, be made that this course of conduct provided a taint from the bench. Such a taint would of course devolve upon the unfortunate head of the petitioner who, in the eyes of the jury, must have seemed to be deemed unworthy of all but a perfunctory trial.

The cases have all one theme in common, that common strand being that to fulfill the requirements of right

to counsel the counsel must be permitted to be effective. *Thomas* v. *District of Columbia*, 90 F. 2d 424.

The Trial Judge, it may be seen from the record as well as the bill of exceptions, all through the trial and even unto the end in the course of the final arguments so vituperated and low-rated the defense counsel, and shouted at them from time to time, that their effectiveness as advocates for the petitioner was all save emasculated, their only function being to salvage what could be of the mantle of innocence which the law of the land requires the courts to allow the defendant until proven otherwise.

The cases rendered by this Honorable Court in support of petitioner's contention that he is allowed the right to effective counsel are *Powell* v. *Alabama*, 287 U.S. 45, 53 S.C. 55, 77 L.Ed. 158, 84 ALR 527, *Avery* v. *State of Alabama*, 84 L.Ed. 377, 308 U.S. 444, *Hawk* v. *Olsen*, 326 U.S. 271, 90 L.Ed. 158, 66 S.C. 116.

The Trial Court in its conduct of the case made a violent attack on the rights of the petitioner in that it effectively denied the petitioner the right to be heard by counsel, thereby denying petitioner his rights under the Constitutions of the United States and the State of Mississippi.

The Trial Court so acted, and it is indicated in the bill of exceptions, that the Chief Defense Counsel was unable to more than begin his opening remarks in the course of his final arguments before the Court silenced him in a most ill-mannered and prejudicial manner, shouting and yelling at said Chief Counsel to "sit down." and Shut up!"

The Associate Counsel for the defense was allowed to read the instructions to the jury and make a few very short remarks on the case in highly general and nebulous terms. The Chief Counsel opened his remarks and pro-

ceeded to attempt to develop his case, whereupon the Trial Court in a fit of temper so violent that prejudice could not be avoided, stopped the Chief Counselor before he had even time to begin on his argument. The predicate for this highly unreasonable course of action on the part of the Trial Court is as unfathomable as it is unpardonable. It is conceded that the trial in the course of holding such a marathon session must have caused tempers to wear thin; but such consideration while it makes the prejudicial conduct more understandable fails to render it any the less inexcusable.

The prosecution was allowed in excess of the time allowed the defense attorneys to the prejudice of the petitioner. The County Attorney and the District Attorney each argued the evidence to the jury. The County Attorney employed twenty minutes and the time estimates of the District Attorney's argument ranges upward from twenty minutes. The time, while being accurately kept during the talks of the other three attorneys hereinabove mentioned, was not so kept for the time of the District Attorney's talk. The reason for this lack of accuracy is found in the surprise factor given the limitation by the Trial Court. None of the attorneys expected the Trial Court to act in such a capricious manner and arbitrarily deny the petitioner the right to be heard by his Chief Counsel. The Chief Counsel for the Petitioner was only allowed a time of TEN MINUTES in which to comment on the evidence and law which were to determine the life of the man accused. The charge was capital. The punishment could have been severe to a degree much greater than was actually realized. However, the Trial Court not only felt no qualms in denying the petitioner this fundamental right, but he felt so little was due the petitioner that the previous shouted insults and vitupera-

tion he visited upon the counsel of the petitioner displayed his feelings regarding this before a jury.

The time allowed for the District Attorney to comment on the case and argue the evidence may be approximated by taking into consideration the following facts which fortunately are of record: The time of the rebuttal testimony's beginning was entered in the record as being eight P.M. (R. page 256). The rebuttal testimony occupied only twenty-eight pages of short questions which ended, according to the bill of exceptions, which was signed by the County Prosecutor, at eight thirty-five P.M.

At this point the time began running for final arguments and instructions to the jury. According to Mississippi custom the instructions are read to the jury by the respective attorneys for each side of the issue. This was included in the time allowed each side.

The case went to the jury at slightly after nine fifty P.M. and the bill of exceptions indicates that the District Attorney was addressing the jury at nine thirty-five P.M. and the case was given the jury shortly after he had addressed them for nearly twenty minutes during which time he was not harassed or hindered in any manner by the Court or anyone else.

It is most earnestly and with the highest considerations of an advocate that the petitioner's right to counsel and his right stemming therefrom to have his counsel comment on the case and summarize it to the jury are sought in this August Court. There are many cases which deny the right of a trial court to unreasonably deny the right of counsel to adequately argue the case to the jury. And, although it is generally within the sound discretion of the trial court to determine and set the limits of time for oral presentation to the jury, counsel for the petitioner assert and submit that in this case where there were eighteen

witnesses, and their testimony was conflicting in vital areas that were determinative of the case, such a limitation, which was not imposed on the prosecution, unquestionably operated to the great and severe prejudice of the petitioner, thereby denying him a fair trial and due process of law.

The fact that the time allowed for commenting on the evidence was not satisfactory was indicated in an apologetic portion of Mr. Justice Brady's opinion when he said for the Mississippi Supreme Court: "This Court recognizes and it is common knowledge that the courts of Jackson, Harrison and other counties on the Coast are extremely congested." (opinion Appendix ii).

It is submitted to the Supreme Court of the United States that no matter how congested a docket may be there is never any excuse for denying a man a fair and orderly complete trial of the crime of which he is accused.

The cases which seem to render this effect are: *Collingsworth* v. *Mayo*, 173 F. 2d 695; *Powell* v. *Alabama*, *supra*, *Butler* v. *United States*, 317 F. 2d 249 (1963) (Cert. Denied) 375 U.S. 836, 11 L.Ed. 2d 65, 84 S.C. 67 (Cert. Denied) 375 U.S. 838, 11 L.Ed. 2d 65, 84 S.C. 77 and many others entirely too numerous to cite.

The decisions of the Supreme Court of the United States have historically been against granting of certiorari in the area of time limitations placed on counsel for arguments to the jury or to the court. This makes the determination by this Honorable Court.

It is again urged on the Court that Petitioner will be a man without justice, a convict without fairness and an inmate of a penitentiary for a long term in the event that he is not given another trial. It is urged upon the Court

that Petitioner has not had his day in court and is seeking nothing else. Petitioner is only seeking that which is the heritage of every American and if there is a denial of the determination of this vital and essential issue petitioner will be undoubtedly followed to the penitentiary by many others unless and until the court assumes its jurisdiction under its power of certiorari.

As court of last resort and guardian of the liberties of the American people the Court, it is respectfully urged, should grant a writ of certiorari, which would allow a final review and final adjudication of the rights of petitioner.

CONCLUSION

The decision below is palpably erroneous and violative of petitioner's constitutional rights, and for the reasons set forth above it is hence respectfully submitted that this petition for certiorari should be granted and the case set down for hearing on briefs on the merits and oral argument.

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Pascagoula, Mississippi
Attorney for Petitioner

W. ROBERTS WILSON, JR.
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Attorney for Petitioner

CERTIFICATE OF MAILING

We, ALBERT S. JOHNSTON, III and W. ROBERTS WILSON, JR., do hereby certify that we have this day mailed, postage prepaid, two true and correct copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Mississippi to the Attorney General of the State of Mississippi, at his office in the New Capitol Building, Jackson, Mississippi.

Dated this 20th day of June, 1969.

ALBERT S. JOHNSTON, III

W. ROBERTS WILSON, JR.

APPENDIX i

Constitutional and Statutory Provisions Involved

Constitution of the United States

Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Amendment XIV. All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which abridges the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mississippi State Constitutional Provisions

Section 14. No person shall be deprived of life, liberty, or property except by due process of law.

Section 26. In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to

give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or the crime against nature the court may, in its discretion exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

State Statutory Provisions

Section 2218 subparagraph (f) of the Mississippi *Code* of 1942, recompiled .

The killing of a human being by the act, procurement, or omission of another shall be justifiable in the following cases:

(f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished.

APPENDIX ii

Opinion

Cite as Miss., 220 So.2d 295

Albert Sidney Johnston, III, Pascagoula, for appellant.

Joe T. Patterson, Atty. Gen., by Guy N. Rogers, Asst. Atty. Gen., and Laurence Y. Mellen, Special Asst. Atty. Gen., Jackson, for appellee.

BRADY, Justice:

The appellant, Gaston Turner, was indicted for the crime of murder arising out of the shooting and death of Jerome McCool on November 12, 1967, at the Paddock Club. The appellant was tried in the Circuit Court of Jackson County, Mississippi, and convicted of the crime of manslaughter and was sentenced to ten years in the Mississippi State Penitentiary.

The facts pertinent to this appeal are as follows: It is undisputed that the appellant shot Jerome McCool in the corner of his right eye with a .38 Cobra Colt snub-nosed revolver and that McCool died as a result of these wounds. Other relevant facts leading up to the shooting are in dispute. Jerome McCool arrived at the Paddock Club sometime between 10:00 and 11:30 P.M. but was denied admission by a hostess who testified he had been drinking. A witness for the prosecution testified that McCool was not intoxicated at the time. All of the witnesses for the State denied hearing McCool make any threatening remarks, but stated that he was leaving peacefully. The night was foggy, but there was a large floodlight outside. Witness Charles Weaver testified that when McCool reached his car some forty to fifty feet from where the appellant was standing he took his car keys from his pocket and turned around and was facing the appellant when the appellant shot him. The car keys were found under the edge of McCool's body. No weapon was found. Fines Ellis testified that after the shooting he heard the appellant say, "Well, I'll get the rest of them." Frankie Culpepper stated that when he asked to be allowed to use the telephone at the club to call the police and an ambulance he was told by appellant that they had no telephone, although they actually did. The record undisputedly shows that the appellant never bothered to check on the condition of McCool, but simply leaned against the club building. He testified he was afraid to go to where McCool lay and where some friends of McCool had congregated.

Mrs. Turner, who was taking admissions at the door of the club on the night of the shooting, testified that she saw McCool drive up into the yard, spin around and around until the car almost turned over, and then slide up to the fence and park. Mrs. Turner testified that she denied

McCool admittance because he was drunk, but that he stayed outside near the door for an hour or an hour and a half and made obscene remarks to people entering the club. Mrs. Turner and McCool got in a pushing match, and when the appellant went to her rescue, Mrs. Turner testified that McCool stated, "I'm going to get my gun and kill all you * * *," and that he then broke and ran for his car. She testified that the appellant pleaded with him not to do it. She further stated that she called information and asked them to send an ambulance and the police and that she allowed Frankie Culpepper to use the telephone. She also testified that McCool's friends threatened "to get" the appellant after the shooting.

Mrs. Dykes, another employee of the club, stated that the appellant had a blood clot in his leg and it was because of this that he leaned against the building.

Witnesses for the defense in substance testified to the effect that McCool threatened the appellant, walked quickly or trotted to the car, reached inside, turned around quickly with his hand raised. They stated that it was very foggy and that they were unable to see what McCool had in his hand.

There are numerous conflicts in the testimony, other than those discussed above, regarding time, distances, where the car keys were, whether the car door was opened, who closed the door, who arrived at the body first, and similar disputes.

The appellant assigns ten errors, six of which relate to the evidence. The other four errors assigned are: One, the State failed to prove venue. Two, the court erroneously placed an arbitrary limit on the time for oral argument and then refused to allow use of the time so allotted. Three, Instruction No. 2 for the State is incorrect. Four,

appellant should have been given the peremptory instruction requested, or granted a new trial.

[1] Appellant's first contention is that the case should be reversed because the jury verdict is against the overwhelming weight of the evidence. As we have held time and time again, the jury is the trier of fact. A careful review of the record shows that there were numerous conflicts in the testimony of witnesses and convinces us that the jury had ample evidence upon which to find the defendant guilty of manslaughter. We are forced to conclude therefore that the verdict is not against the overwhelming weight of the evidence.

[2, 3] The appellant first urges that the case at bar should be reversed because the prosecution failed to establish venue. When asked in what county the crime was committed, Charles Weaver, witness for the State, testified, "I guess it would be in Jackson County." After an objection was made by the attorney for the appellant, the witness stated, "It would be in Jackson County, then." Charles Weaver further stated that the shooting occurred in Mississippi. Venue is not proved by a witness who testifies that he guesses venue is in a named county. Powers v. State, 156 Miss. 316, 126 So. 12 (1930). After an objection was made by appellant's attorney in the case at bar, the witness corrected himself and stated positively that the crime occurred in Jackson County. This is the only evidence offered as to venue by the State. As was suggested in Reece v. State, 154 Miss. 862, 123 So. 892 (1929), we hold that such a correction was properly permitted and was adequate to establish venue. Although additional proof could have been offered by the State to prove venue even more conclusively, we hold under all the facts that the proof was sufficient to meet the burden placed on the State.

Appellant's attorney also alleges that the appellant was deprived of his rights to a fair and impartial trial. These objections relate to the sustaining and overruling of objections made by the appellant and the State; that the trial court required appellant's counsel to proceed with undue haste and was obviously harsh in his rulings toward appellant's attorneys; and finally, that insufficient time was allowed appellant for his summation.

[4-7] This Court recognizes and it is common knowledge that the courts of Jackson, Harrison and other counties on the Coast are extremely congested. The trial judge has the duty of conducting an orderly trial. Luttrell v. United States, 320 F.2d 462 (5th Cir. 1963). It is also his duty to see that the court's time is used economically. Griffin v. State, 171 Miss. 70, 156 So. 652 (1934). Likewise, the trial judge is allowed discretion in the conduct of a trial. Stokes v. State, 240 Miss. 453, 128 So.2d 341 (1961). The special bill of exceptions filed by appellant fails to comply with the statutory requirements. Geiselbreth v. Mississippi Power & Light Co., 166 Miss. 749, 147 So. 784 (1933); Pittman v. State, 155 Miss. 745, 124 So. 761 (1929). Nevertheless; because of the nature of this case, we have duly considered it. A trial judge should be meticulously careful in seeing that the defendant is afforded ample time in any case in order that he may adequately present to the jury the instructions and have sufficient time for his summation. The ultimate of a criminal prosecution is the verdict of the jury and frequently the decision of the jury is made substantially on the presentation of the law and the summation of the facts. It is a far better thing for the trial court to be indulgent in the granting of time for presenting the instructions and summation than to be strict or to be frugal in the allowance thereof.

[8, 9] After a careful and objective study of the record in the case at bar we find that the proof is insufficient for us to hold that the court abused its discretion. We find, therefore, that the court properly exercised its prerogative in carrying out its duties. We further hold that the conduct of the trial was not prejudicial to the appellant and that none of his constitutional rights were infringed.

[10] The appellant assigns as error the granting of the following instruction requested by the State:

> The Court instructs the jury for the State that to make a homicide justifiable on the grounds of self-defense, the danger to the slayer must be actual, present and urgent or the slayer must have reasonable grounds to apprehend and in fact apprehend a design on the part of the deceased to kill him, or to do him great bodily harm, and, *in addition to this* that there was imminent danger of such design being accomplished; and hence mere fear, apprehension, or belief, however sincerely entertained by one person that another designed to take his life or to do him some great bodily harm will not of itself justify the former in taking the life of the latter party. A party may have an apprehension that his life is in danger, and believe the grounds of his apprehension just and reasonable, and yet he acts at his peril. He is not the final judge; the jury may determine the reasonableness of the ground upon which he acted. (Emphasis added.)

The gravamen of appellant's contention is that the words "* * *, and, in addition to this, that there was imminent danger of such design being accomplished * * *" shifted the burden of proof to the appellant and created confusion. Similar instructions have been approved numerous times by this Court. Holmes v. State, 199 Miss. 137, 24 So.2d 90 (1945); Harris v. State, 47 Miss. 318 (1872); Evans v. State, 44 Miss. 762 (1870). The appellant urges that the instruction in Reddix v. State, 134 Miss. 393, 98 So.

850 (1924), supports his contention that the instruction in the case at bar is erroneous. We cannot agree with this contention because the two instructions are clearly distinguishable. In the *Reddix* case the words "* * * it was encumbent on the defendant to show * * *" causes the burden of proof to shift to the defendant and makes the instruction erroneous. Likewise, the rule set out in Weathersby v. State, 165 Miss. 207, 147 So. 481 (1933), is inapplicable in this case for the reason that the case at bar presented several witnesses who supported the State's factual presentation of the killing, including an eyewitness to the homicide.

We find that the antecedent of the word "this," in the parenthetical phrase "in addition to this," is not crystal clear. However, we are convinced that the antecedent is the word "design." Although this portion of the instruction considered solely might be open to question, when the instruction is read as a whole and together with all the other instructions granted the State and the appellant, we safely conclude that the law pertaining to self-defense was thoroughly and clearly presented to the jury and that no reversible error was committed by granting the instruction complained of.

[11] Material and conflicting errors of fact were presented in the testimony offered by the State and the appellant, which errors were for determination by the jury; therefore, the appellant was not entitled to a peremptory instruction and the court properly left these questions for determination by the jury.

For the foregoing reasons, the judgment of the lower court is affirmed.

Affirmed.

ETHRIDGE, C. J., and INZER, SMITH and ROBERTSON, JJ., concur.